STATE OF MICHIGAN

COURT OF APPEALS

KATHY MARCHETTO and JOHN MARCHETTO,

Plaintiffs-Appellants,

v

SUE KISS,

Defendant-Appellee.

UNPUBLISHED
January 4, 2007

No. 270772
Macomb Circuit Court
LC No. 2005-002521-NO

Before: Jansen, P.J., and Sawyer and Bandstra, JJ.

PER CURIAM.

Plaintiffs, Kathy Marchetto (Marchetto) and her husband John Marchetto, appeal as of right an order granting defendant's motion for summary disposition. We affirm.

This premises liability action arises out of a trip and fall accident on defendant's driveway. Marchetto sustained injuries to her left elbow, left shoulder and right knee. On appeal, plaintiffs argue that defendant's driveway did not pose an open and obvious danger, or alternatively, that defendant's driveway was unreasonably dangerous as a matter of law. We disagree.

We review a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion brought pursuant to MCR 2.116(C)(10) should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties, in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Ritchie-Gamester v Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

In a premises liability action, the plaintiff must establish the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages. *Taylor v Laban*, 241 Mich App 449, 452; 616 NW2d 229 (2000). Different standards of care are owed to

a plaintiff in accordance with the plaintiff's status on the land. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). A person invited on the land for the owner's commercial purposes or pecuniary gain is an invitee. *Id*. at 604. A landowner has a duty to an invitee to exercise reasonable care to protect or warn against an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). However, the premises possessor generally does not have a duty to invitees to warn or protect them against open and obvious dangers. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 92; 485 NW2d 676 (1992).

The test to determine if a danger is open and obvious is whether an average person with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection, not whether a particular plaintiff should have known that the condition was hazardous. *Joyce v Rubin*, 249 Mich App 231, 238-239; 642 NW2d 360 (2002), citing *Novotney v Burger King (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). Although an invitor must exercise reasonable care for the protection of an invitee, the invitor is not an absolute insurer of the safety of an invitee. *Anderson v Weigand*, 223 Mich App 549, 554; 567 NW2d 452 (1997).

Plaintiffs argue that the cracked concrete driveway was not an open or obvious danger because it was difficult to see at night. However, accidents involving commonly occurring defects, such as differing floor levels and steps, are not actionable unless there is something unusual about the uneven floor or steps. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614-615; 537 NW2d 185 (1995). There is nothing unusual about uneven driveway and sidewalk surfaces since they are encountered on a daily basis, and are similar to the "typical pothole" described in *Lugo*. *Lugo*, *supra* at 520. Furthermore, individuals who work outside in the dark can easily ensure their own safety by carrying a flashlight. We conclude that, viewing the evidence in the light most favorable to plaintiffs, reasonable minds could not differ in concluding that the defective condition of the driveway was an open and obvious danger.

Next, plaintiffs argue that the cracked driveway, even if open and obvious, was unreasonably dangerous due to special aspects of the defect. If there are special aspects of an open and obvious condition that create an unreasonable risk of harm, the invitor retains the duty to protect or warn the invitee regarding the danger. *Id*. at 517. The *Lugo* Court discussed two types of dangers that can constitute an unreasonable risk of harm: (1) a danger that is unavoidable, or (2) a danger that poses a uniquely high severity of harm if the risk is not avoided. *Id.* at 517-519.

Plaintiffs claim that defendant's failure to light the driveway created a special aspect that made the driveway unreasonably dangerous. However, defendant's decision to leave her porch light off did not make the harm unavoidable, since the lighting had no bearing on which route Marchetto took to reach defendant's porch on any given occasion. Moreover, even assuming that some harm was likely, the absence of lighting did not transform that harm into the type that would cause substantial risk of death or severe injury.

Citing *O'Donnell v Garasic*, 259 Mich App 569; 676 NW2d 313 (2003), plaintiffs next argue that a violation of a safety code can constitute a special aspect. Plaintiffs' expert opined that defendant was in violation of ordinances requiring her to keep her driveway in a proper state of repair and free of hazardous conditions, and requiring that roof water not be discharged in a

manner that created a public nuisance.[1] However, the *O'Donnell* Court stated that "[n]ot all . . . code violations will support a special-aspects factor analysis in avoidance of the open and obvious danger doctrine," and that "[t]he critical inquiry is whether there is something unusual about [the alleged defect] that gives rise to an unreasonable risk of harm." *Id.* at 578-579, citing *Bertrand*, *supra* at 617. Per *Lugo*, there is nothing unusual about a cracked concrete driveway that would create an unreasonable risk of harm.

Finally, plaintiffs argue that Marchetto's use of the driveway was effectively unavoidable, creating a special aspect. However, plaintiff herself admitted that she sometimes walked across the grass to reach defendant's porch. Thus, the driveway was not effectively unavoidable.

Viewing the evidence in the light most favorable to plaintiffs, we conclude that reasonable minds could not differ in concluding that there were no special aspects of the driveway making it unreasonably dangerous. The trial court properly granted defendant's motion for summary disposition under the open and obvious danger doctrine.

Affirmed.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Richard A. Bandstra

[1] According to plaintiffs' expert, the city of St. Clair Shores adopted the International Property Maintenance Code of 2003. Section 302.3 of the code provides, "All sidewalks, walkways, stairs, driveways, parking spaces and similar areas shall be kept in a proper state of repair, and maintained free from hazardous conditions." Section 304.7 provides, "Roof drains, gutters and downspouts shall be maintained and in good repair and free of obstructions. Roof water shall not be discharged in a manner that creates a public nuisance."